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Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(L)-159–07 OF 2018 (W)
VERNON ONG, ZABARIAH YUSOF AND HASNAH HASHIM FCJJ
13 JANUARY 2021

C *Criminal Procedure — Forfeiture — Properties seized under Anti-Money Laundering, Anti-Terrorism Financing Act 2001 ('the AMLATFA') — Application by public prosecutor ('PP') under s 56(1) of AMLATFA to forfeit seized properties — Whether PP had failed to prove on balance of probabilities that seized properties were obtained as a result of or in connection with a money*
D *laundering offence under s 4(1) of the AMLATFA — Whether PP had also failed to show that seized properties were procured from proceeds of commission of predicate offences on which alleged money laundering offence was based — Whether PP's application had to be dismissed and the seized properties returned to their owners*

E

Police had seized substantial sums of monies and land ('properties') belonging to the respondents under the Anti-Money Laundering, Anti-Terrorism Financing Act 2001 ('AMLATFA') on the ground that they were procured using the proceeds of unlawful activity, namely, proceeds from the commission
F of offences under ss 409 and 420 of the Penal Code ('the predicate offences') by four persons ('the four accused'). None of the four accused was convicted for the predicate offences as the charge was withdrawn against one of them while the others were acquitted without their defence being called. The respondents herein were also not charged with committing any money laundering offence
G under s 4(1) of the AMLATFA. The appellant nevertheless applied to the High Court under s 56(1) of the AMLATFA for an order that the seized properties be forfeited if the court was satisfied, on balance of probabilities, that the properties were procured as a result of or in connection with an offence under s 4(1) of the AMLATFA. The High Court dismissed the application and
H ordered the properties to be returned to the respective respondents on finding that, inter alia: (a) the prosecution had not established any link between the properties and the predicate offences or any offence of money laundering; (b) the affidavit evidence tendered by the appellant was hearsay and inadmissible; and (c) there was no proof that the properties were procured from
I the proceeds of any unlawful activity. In the instant appeal against the upholding of the High Court's decision by the Court of Appeal ('COA'), the appellant argued that the affidavits tendered on its behalf gave details of the money trail, and together with other documentary evidence it was sufficient to prove that the seized properties were the subject-matter of, or used in the

commission of a money laundering offence under s 4(1) of the AMLATFA. The respondents, however, pointed out that the prosecution had neither proven the commission of the predicate offences beyond reasonable doubt nor had it identified the nature and extent of participation of the respondents in any money laundering offence.

Held, unanimously dismissing the appeal and affirming the COA's decision:

(1) The prosecution had failed on balance of probabilities to satisfy the court that all the essential requirements in s 56(1) of the AMLATFA had been established. The prosecution had failed to identify the nature and extent of participation of the respondents in any offence of money laundering and also failed to show that the properties were procured using proceeds from the commission of the predicate offences (see paras 50–51).

(2) The affidavits supporting the appellant's application contained hearsay evidence, serious gaps and material errors of fact. There was no documentary evidence to show that the properties were procured from the proceeds of any illegal activity. The deponents of the affidavits did not provide the names, identity and sources of information upon which they relied or state why they believed such information. The affidavits failed to show any link between the respondents and the predicate offences and/or any money laundering offence. If the four accused had committed money laundering, it was incumbent upon the prosecution to show in what way the respondents had abetted them or participated in an illegal activity (see paras 46–47 & 49).

(3) The affidavits merely described the money trail, in particular, the movement of money from the first respondent's accounts to various other accounts but failed to offer any evidentiary proof that the seized properties were from the subject-matter of or was used in the commission of the offence of money laundering or that they were connected to the two predicate offences. The affidavits lacked substantial evidence to support the allegation of the commission of the predicate offences; neither was any evidence disclosed that the respondents had abetted the four accused or had participated in the commission of the offences. There was no explanation of how the properties were funded and their linkage to any illegal transaction. On the contrary, the respondents through their affidavits in reply had explained in detail and adduced sufficient documents to justify the manner in which the properties were procured (see paras 48–49).

[Bahasa Malaysia summary

Polis telah merampas sejumlah besar wang dan tanah ('harta') yang dimiliki oleh responden-responden di bawah Akta Pencegahan Pengubahan Wang Haram, Pembiayaan Keganasan 2001 ('Akta') atas alasan bahawa ia telah

diperoleh menggunakan hasil aktiviti haram, iaitu, hasil daripada pelakuan kesalahan-kesalahan di bawah ss 409 dan 420 Kanun Keseksaan ('keslaahan predikat') oleh empat orang ('empat tertuduh'). Tiada antara empat tertuduh itu telah disabitkan untuk kesalahan predikat kerna pertuduhan telah ditarik balik terhadap salah seorang daripada mereka manakala yang lain telah dibebaskan tanpa pembelaan mereka dipanggil. Responden-responden juga tidak didakwa kerana melakukan apa-apa kesalahan pengubahan wang haram di bawah s 4(1) Akta. Perayu walau apa pun telah memohon kepada Mahkamah Tinggi di bawah s 56(1) Akta untuk satu perintah agar harta yang dirampas itu disita jika mahkamah berpuas hati, ata imbangan kebarangkalian, bahawa hart aitu telah diperoleh akibat daripada atau berkaitan dengna kesalahan di bawah s 4(1) Akta. Mahkamah Tinggi telah menolak permohonan itu dan memerintahkan hart aitu dikembalikan kepada responden-repsonden masing-masingnya setelah mendapati bahawa, antara lain: (a) pendakwaan tidak membuktikan apa-apa kaitan antara harta itu dan kesalahan-kesalahan predikat atau apa-apa kesalahan pengubahan wang haram; (b) keterangan afidavit yang ditenderkan oleh peryau adalah dengar cakap dan tidak boleh diterima; dan (ciii) tiada bukti bahawa harta itu telah diperoleh daripada hasil mana-mana aktiviti haram. Dalam rayuan ini terhadap keputusan Mahkamah Tinggi yang dikekalkan oleh Mahkamah Rayuan ('MR'), perayu berhujah bahawa afidavit-afidavt yang ditenderkan bagi pihaknya memberi butiran jejak wang, dan bersama dengan keterangan dokumentar ia adalah mencukupi untuk membuktikan bahawa harta yang dirampas adalah hal perkara untuk, atau digunakan dalam pelakuan kesalahan pengubahan wang haram di bawah s 4(1) Akta. Responden-responden, bagaimanapun, menunjukkan bahawa pendakwaan tidak membuktikan pelakuan kesalahan predikat tersebut melampaui keraguan munasabah atau pun ia telah mengenal pasti sifat dan tahap penglibatan responden-responden dalam apa-apa kesalahan pengubahan wang haram.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan keputusan MR:

(1) Pendakwaan telah gagal atas imbangan kebarangkalian untuk memuaskan mahkamah bahawa semua keperluan penting dalam s 56(1) Akta telah dibuktikan. Pendakwaan telah gagal untuk mengenal pasti sifat dan tahap penglibatan responden-responden dalam apa-apa kesalahan pengubahan wang haram dan juga telah gagal menunjukkan bahawa harta itu telah diperoleh menggunakan hasil daripada pelakuan kesalahan predikat (lihat perenggan 50–51).

(2) Afidavit-afidavit yang menyokong permohonan perayu mengandungi keterangan dengar cakap, jurang yang serius dan kesilapan fakta penting. Tiada keterangan dokumentar untuk menunjukkan bahawa harta itu telah diperoleh daripada hasil apa-apa aktivit haram. Deponen-deponen afidavit-afidavit tersebut tidak memberikan nama-nama, identity dan sumber maklumat yang mana mereka bergantung kepada atau

menyatakan kenapa mereka mempercayai maklumat tersebut. Afidavit-afidavit tersebut gagal menunjukkan apa-apa kaitan antara responden-responden dan kesalahan-kesalahan predikat dan/atau apa-apa kesalahan pengubahan wang hawam. Jika empat tertuduh itu telah melakukan pengubahan wang haram, ia menjadi tanggungjawab pendakwaan untuk menunjukkan dalam ap acara responden-responden telah bersubahat dengan mereka atau terlibat dalam apa-apa aktiviti haram (lihat perenggan 46–47 & 49).

(3) Afidavit-afidavit tersebut hanya menggambarkan jejak wang, khususnya aliran wang dari akaun responden pertama kepada pelbagai akaun lain tetapi gagal menawarkan apa-apa bukti keterangan bahawa harta yang dirampas itu adalah dari hal perkara atau digunakan dalam pelakuan kesalahan pengubahan wang haram atau bahawa ia berkait dengan dua kesalahan predikat. Afidavit-afidavit tersebut tiada keterangan substantial untuk menyokong dakwaan pelakuan kesalahan predikat; atau pun apa-apa keterangan ditunjukkan yang responden-responden telah bersubahat dengan empat tertuduh itu atau terlibat dalam pelakuan kesalahan tersebut. Tiada penjelasan tentang bagaimana harta tersebut dibiaya dan kaitannya denga napa-apa transaksi haram. Sebaliknya, responden-responden melalui afidavit-afidavit balas mereka telah menjelaskan secara terperinci dan mengemukakan dokumen yang mencukupi untuk mewajarkan cara harta tersebut diperoleh (lihat perenggan 48–49).]

Cases referred to

H and others (minors), Re (sexual abuse: standard of proof) [1996] 1 All ER 1, HL (refd)

Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)

PP v Billion Nova Sdn Bhd & Ors [2016] MLJU 1823; [2016] 2 CLJ 763, CA (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3, 4, 4(1), (1)(a), (2), 56, 56(1), 61, 70(1)

Criminal Procedure Code s 424

Federal Constitution art 13

Penal Code ss 409, 420

Port Authorities Act 1963

Appeal from: Criminal Appeal No W-09–248–11 of 2011 (Court of Appeal, Putrajaya)

Faizah bt Mohd Salleh (Nahra bt Dollah, Hanim bt Mohd Rashid and Allan

Suman Pillai with her) (Public Prosecutor, Attorney General's Office) for the appellant.
Prem Ramachandran (Porres P Royan with him) (Kumar & Partnership) for the first, second, third, fourth, fifth and sixth respondents.
K Kumaraendran (Kumar & Co) for the seventh and eighth respondents.
Shamsul bin Sulaiman (Shamsul Sulaiman) for the ninth respondent.

Hasnah Hashim FCJ (delivering judgment of the court):

[1] The principal issue in this appeal is whether the public prosecutor (PP) can forfeit the property seized pursuant to the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFA').

[2] The properties and monies were seized throughout the period between *25 November 2009* until *25 October 2010* on the basis that the properties and monies were procured from proceeds of unlawful activity under s 4 of the AMLATFA. The legal battle in respect of the subject matter of this appeal began in 2010 when the PP filed the notice of motion on *23 November 2010*, two days before the expiry of the time period prescribed, to move the High Court to forfeit the properties and monies of the respondents pursuant to s 56(1) of the AMLATFA on the basis that the properties and monies were procured illegally as a result of or in connection with an offence under s 4(1) of the AMLATFA. The prosecution contended that the seized properties and monies were procured in connection with the commission of series of offences under ss 409 and 420 of the Penal Code ('the PC') ('the predicate offences') by the accused, namely, Datin Paduka Phang Oi Choo ('OC Phang'), who was at that time the Managing Director of Lembaga Pelabuhan Klang ('LPK'), Law Jenn Dong, the Project Director of Kuala Dimensi Sdn Bhd, the first respondent (Kuala Demensi), Bernard Tan Seng Swee, an architect from BTA Architect, and one Stephen bin Abok.

[3] On *4 November 2011* the learned High Court judge dismissed the notice of motion filed by the PP pursuant to s 56(1) AMLATFA to forfeit the seized properties belonging to the respondents and ordered the properties and monies to be released to the respective respondents as the PP failed to prove that the seized properties were procured as a result of or in connection with an offence under s 4(1) of the AMLATFA as required under s 56(1) of the same Act. Dissatisfied, the PP appealed against the decision of the High Court and, on *13 November 2014* the Court of Appeal dismissed the PP's appeal as the properties and monies sought to be forfeited have been released to the respondents by virtue of the High Court order dated *4 November 2011*. Furthermore, there was no stay or preservation order which means that the

substratum of the appeal was no longer in existence thus rendering the appeal academic.

[4] The PP appealed to the Federal Court on *28 March 2017*. The Federal Court allowed the PP's appeal and ordered for the appeal to be remitted to the Court of Appeal to be heard on its merits. A different panel of the Court of Appeal heard the appeal on merits and dismissed the appeal and affirmed the High Court's order.

[5] Dissatisfied with the Court of Appeal's decision the PP appealed to this court. We heard the oral submissions of the respective counsel for the parties. As we needed time to consider the submissions of the parties and the records of appeal, we had indicated to parties that we will inform them of our decision once we are ready to do so. This is our decision and our reasons for having so decided.

THE PROPERTIES

[6] The properties and monies seized from the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth respondents sought to be forfeited by the PP are as described below:

(a) the monies in the sum of RM30,929,360 in an account No 1554190773 belonging to Kuala Dimensi and the second respondent at OSK Investment Bank Bhd, Level 7, Plaza OSK Jalan Ampang, 50450 Kuala Lumpur, seized on 25 November 2009;

(b) the monies in the sum of RM48,897.93 in a current account No 2–14231–0003375–8 belonging to Kuala Dimensi at RHB Bank Bhd, Ground & Mezzanine Floor, Plaza OSK Jalan Ampang, 50450 Kuala Lumpur, seized on 25 November 2009;

(c) the monies in the sum of RM6,683.66 in a current account No.10-002-001611-0 belonging to Kuala Dimensi at Affin Bank Bhd, Ground Floor, Menara Affin, No 80, Jalan Raja Chulan, 50200 Kuala Lumpur, which was seized on 8 January 2010;

(d) the monies in the sum of RM25,965.71 in a current account No 0018–10–005503–3 belonging to Kuala Dimensi at EON Bank Bhd, Jalan Raja Laut, 200 Kuala Lumpur, seized on 8 January 2010;

(e) a piece of land described as PM, 1621, Lot 26382, Pulau Lumut, Mukim Klang, Selangor owned by the third respondent CSSB seized on 31 December 2009;

(f) a Bank Islam banker's cheque No 087542 dated 31 December 2009 for the sum of RM1,349,536.26 belonging to the fourth respondent seized on 31 December 2009;

(g) an EON Bank Bhd banker's cheque No 082944 dated 31 December 2009 for the sum of RM3,650,463.74 belonging to fourth respondent seized on 31 December 2009;

(h) a Bank Islam banker's cheque No 093416 dated 18 May 2010 for the sum of RM50,000 belonging to fourth respondent seized on 24 May 2010;

(i) the monies in the sum of RM415,059.71 in a current account No 10–002–001616–5 belonging to the fifth respondent at Affin Bank Bhd, Ground Floor, Menara Affin, No 80, Jalan Raja Chulan, 50200 Kuala Lumpur, seized on 8 January 2010;

(j) the monies in the sum of RM271,911.11 in a current account No 0018–10–005770–1 belonging to fifth respondent at EON Bank Bhd, Jalan Raja Laut, 200 Kuala Lumpur, seized on 8 January 2010;

(k) an EON banker's cheque dated 10 February 2010 bearing the Number 083622 for the sum of RM50,000 belonging to fifth respondent which was seized on 10 February 2010;

(l) an EON banker's cheque dated 30 June 2010 bearing the number 087097 for the sum of RM75,000 belonging to, fifth respondent seized on 24 May 2010;

(m) a piece of land described as TL No 017533238, Daerah Kota Kinabalu, Sabah belonging to the fifth respondent seized on 29 May 2010;

(n) the monies in the sum of RM545,701.83 in a current account No 10-002-002715-4 belonging to the sixth respondent at Affin Bank Bhd, Ground Floor, Menara Affin, No 80, Jalan Raja Chulan, 50200 Kuala Lumpur, seized on 8 January 2010;

(o) the monies in the sum of RM49,426.11 in a current account No 0018–10–005771–8 belonging to sixth respondent at EON Bank Bhd, Jalan Raja Laut, 200 Kuala Lumpur, seized on 8 January 2010;

(p) an EON banker's cheque dated 10 February 2010 bearing the number 083623 for the sum of RM316,000 belonging sixth respondent to, which was seized on 10 February 2010;

(q) a piece of land described with the grant number PN No 73005, Lot 2434, Seksyen 13, Bandar Shah Alam, Daerah Petaling, Selangor owned by the ninth respondent, seized on 14 May 2010; and

(r) a piece of land described with the grant number PN No 73006, Lot 2434, Seksyen 13, Bandar Shah Alam, Daerah Petaling, Selangor owned by PKNS seized on 14 May 2010 ('the properties').

FACTUAL BACKGROUND

[7] Sometime in 1993 the Government of Malaysia decided to develop Port Klang into an integrated free zone operating as a trade and logistics centre with extensive distribution and manufacturing facilities. For this purpose, the Port Klang Free Zone ('PKFZ') was established as a regional distribution hub as well as a trade and logistics centre ('the project'). The Port Klang Authority ('PKA'), a statutory body established under the Port Authorities Act 1963, purchased 1,000 acres (4km2) of land from Kuala Dimensi at a rate of RM25 per sqft for a total consideration of RM1.8 billion, inclusive of interest ('the land').

[8] PKA and Kuala Dimensi entered into a sale and purchase agreement dated 12 November 2002 ('SPA') where PKA agreed to purchase from Kuala Dimensi a piece of land held under Pajakan Negeri 7324 Lot 67894 Daerah and Mukim of Klang in the State of Selangor, measuring approximately 43,538,200 sqft or 999.5 acres for the price of RM1,088,456,000. Pursuant to the terms of the SPA, PKA appointed Kuala Dimensi as the developer to undertake Phase 1 of the project.

[9] Prior to the execution of the SPA, Kuala Dimensi submitted and obtained the relevant approvals for the mixed development to be undertaken on the land for their benefit. Initial works commenced according to the specifications and approvals to cater for the mixed development. It is alleged that the development for which the approvals were obtained was different in substance and in form to the development envisaged for the project.

[10] PKA and Kuala Dimensi entered into a development agreement dated 27 February 2003 (DA1) wherein Kuala Dimensi was appointed as the developer to develop on a turnkey basis as well as to design, built, complete and finance the project involving about 400 acres at a cost of RM400m. The terms of the DA1 were subsequently varied by the parties vide a supplemental agreement dated 26 May 2003 (DA1A) which facilitated Kuala Dimensi to raise funds to finance the Phase 1 of the development.

[11] On the advice of PKA's consultant, Jebel Ali Free Zone International ('JAFZI'), PKA decided to develop the entire Land in a single phase as it will have the effect of reducing the costs of the development by eliminating two sets of mobilisation and demobilisation costs. This resulted in further variations to

A the DA1 by a supplemental agreement dated 27 March 2004 (DA2) whereby the development of one thousand (1,000) acres were to be undertaken at a cost of RM1 billion.

B **[12]** Following the advice of JAFZI, letters of support to undertake the development in one single phase were issued by PKA on 3 March 2004 and the Government of Malaysia. By a supplemental agreement for additional development works dated 30 November 2005 ('ADWA'), Kuala Dimensi was appointed the turnkey contractor to, inter alia, design and carry out additional works in the form of junction improvements, electrical infrastructure as well as
C a business-class hotel at the costs of approximately RM510.3m.

[13] This was followed by another supplemental agreement to the ADWA dated 26 April 2006 ('NADWA'),appointing Kuala Dimensi as the turnkey
D contractor, to inter alia, design and carry out new additional works in the form of electrical infrastructure works for a 33KV and 11KV supply from the Tenaga Nasional Bhd ('TNB') main distribution at Pulau Indah to the project and to Precincts 2 and 8. The NADWA works also comprised a direct access road from the PKFZ project to West Port and a link road from the PKFZ project to West
E Port CT 4. The total development cost of NADWA was approximately RM335.8m.

[14] It was agreed by all parties that the payments for the works carried out under DA1, DA2, ADWA and NADWA were to be deferred in accordance
F with the terms set out in the respective agreements. The relationship between PKA and Kuala Dimensi was governed by the agreements between the parties. By the terms of the agreement there was no restriction in the manner and progress by which Kuala Dimensi was to undertake the construction of the project. The DA1, DA2, ADWA and NADWA were design and build
G contracts and not based on a bill of quantities thus the components of each agreement represented the main elements to be constructed together with the estimated costs. The notices of payments ('NOP') and the architect's certificates are indicative of payments based on estimates subject to the main objective of delivery of the project. The works under all the agreements were
H completed and delivered based on the terms as agreed.

[15] As in most construction contracts several contractual disputes arose between PKA and Kuala Dimensi which culminated into several civil suits being filed. As a consequence a police report lodged by Dato' Lee Hwa Beng,
I the Managing Director of Lembaga Pelabuhan Klang ('LPK') alleging fraud and false claims, the police conducted an investigation in respect of the two main works amounting to a total sum of RM398,633,000. The two main works were the drainage and water supply works under DA1 and DA2, and the 33KV system pursuant to ADWA and NADWA. It was alleged that Kuala

Dimensi had made a double claim totalling RM254,850,000 for the works under DA1 and DA2 where such cost under the SPA were capped at RM25 per sqft.

[16] Based on the investigation conducted by the police led by Superintendant of Police, Rajagopal a/l Ramadhass, the investigating officer (IO). The IO stated in his affidavit dated 23 November 2010 that OC Phang had issued unauthorised variation order (VO) vide a letter dated 2 June 2004 when she had no authority to do so and as well as failing to obtain prior approval of the Board of LPK for such variation and payment. OC Phang had according to the PP committed a criminal breach of trust and was charged under s 409 of the PC.

[17] In respect of the second main works, Kuala Dimensi claimed for payment of works for the construction of electrical infrastructure for the 33KV system and 33KV supply to Precinct 2 and Precinct 8 under ADWA and NADWA, which Kuala Dimensi had not carried out such works. TNB did not approve the construction of electrical infrastructure for the 33KV system by KDSB. Pursuant to ADWA, 12 NOPs which were signed off by Law Jenn Dong, the project Director of Kuala Dimensi. The NOPS were supported by the Architect's Certificate which was signed by Bernard Tan Seng Swee. Both Law Jenn Dong and Bernard Tan Seng Swee were charged with committing the offences under s 420 of the PC in connection with the claim of RM46,267,000 for the electrical infrastructure works for 33KV system.

[18] Kuala Dimensi also submitted a claim of RM76m for works in respect of the 33 kilowatts electrical supply works to Precinct 2 and Precinct 8 such electrical supply works although it is alleged that such works were never carried out Kuala Dimensi. NOPs were signed by Law Jenn Dong and Stephen Bin Abok, and Bernard Tan Seng Swee, the architect, signed the Architect's Certificate. Law Jenn Dong, Bernard Tan Seng Swee and Stephen Bin Abok were all charged for committing an offence under s 420 of the PC for cheating and dishonestly inducing the delivery of property.

[19] It was also alleged that the proceeds of the offences committed by OC Phang, Law Jenn Dong, Stephen Bin Abok, and Bernard Tan Seng Swee were used by the respondents to acquire or possess the properties sought to be forfeited in the present case.

THE HIGH COURT

[20] At the High Court, the PP conceded that there were in fact no charges preferred against any of the respondents for an offence under s 4(1) of the AMLATFA. The charges forming the predicate offence against OC Phang were

withdrawn whilst Law Jenn Dong, Bernard Tan Seng Swee and Stephen Bin Abok were all acquitted without their defence being called.

[21] The main issues raised by the respondents at the High Court can be summarised as follows:

(a) the second to eighth respondents are in effect the legal owners of the respective properties and are not third parties;

(b) s 4(1)(a) of the AMLATFA read together with s 56 of the same Act require the prosecution to establish the existence of a predicate offence beyond a reasonable doubt and not on a balance of probabilities. The prosecution failed to prove on the balance of probabilities that the proceeds from the predicate offences were used by the respondents for money laundering purposes;

(c) it is immaterial whether the first respondent charged 10% or 30% of the total contract sum of RM1 billion to undertake works for a particular set of work;

(d) the IO's affidavit did not state any substantive evidence in support of the averments that the predicate offence has been proved beyond reasonable doubt and the evidence tendered in the affidavit are hearsay and inadmissible; and

(e) the IO failed to appreciate the material facts governing the contractual relationship between the parties and Kuala Dimensi.

[22] The learned High Court judge dismissed the PP's application and made an order that the properties be released to all the respondents. Amongst the reasons:

(a) to succeed in an application pursuant to s 56 AMLATFA the predicate offence must not only be explained and proven, it must be linked to the offence of money laundering as provided under s 4(1) of the same Act. The phrase 'in connection' pursuant to s 56 of the same Act means a substantial connection between the properties sought to be forfeited and the predicate offence;

(b) the predicate offence must be proven beyond reasonable doubt;

(c) the respondents must directly or indirectly be involved in the offence of money laundering with the necessary element of mens rea;

(d) there is a violation in respect of art 13 of the Federal Constitution if the property is forfeited not in accordance with the law;

(e) no proof that the properties sought to be seized were obtained from unlawful activity. The money was paid to the respondents through a

funding exercise. The legality of the funding exercise has not been questioned as it was not only by PKA but supported by the necessary architect certificates;

(f) no link between the properties sought to be forfeited and the offence of money laundering;

(g) the internal workings of PKA are not within the respondents' knowledge and in particular if at all OC Phang had acted beyond her authority it will not be within the knowledge of the respondents;

(h) in an application made pursuant to s 56 of the AMLATFA, a full trial would be much preferable than affidavit evidence since it is a criminal application and any affidavit filed has to be in accordance to s 424 of the Criminal Procedure Code ('the CPC');

(i) the affidavit evidence was not supported by any documentary evidence which is insufficient to satisfy the judge whether standard of proof is required; and

(j) the PP failed to fulfil the requirements under s 56 of the AMLATFA by merely adducing insufficient evidence which is inadmissible as it was hearsay evidence

THE COURT OF APPEAL

[23] The Court of Appeal dismissed the appeal and gave the following reasons for the dismissal:

(a) the relationship of the parties are governed by the various contracts entered into between the relevant parties;

(b) the parties were at all times acting on advice of solicitors when they entered into these contracts;

(c) all payments were made on the issuance of an architects certificate with letters of consent from PKA;

(d) no reason for the respondents to suspect that OC Phang had acted beyond her authority. The internal workings of PKA are not matters within the knowledge of the respondents;

(e) no reason for the respondents to know or have reason to believe that any of the payments made under these contracts were illegitimate. Payments were made from 2004 till 2008 without any complaint by PKA or any other party;

(f) the PP failed to prove that the money and properties sought to be forfeited was paid by PKA to KDSB as 'as a result of' or 'in connection with' the drainage and water supply works and the 33KV electrical infrastructure work; and

(g) the affidavits of the PP do not disclose or link that the proceeds that have been obtained was as a result of or in connection with money laundering under s 4(1) of the AMLATFA or from the predicate offences. The prosecution failed to satisfy the learned High Court judge that the respondents had knowledge or have reasons to believe that the properties are the subject-matter of or was used in the commission of an offence under s 4(1) of the AMLATFA or from the predicate offences, and that there are no bona fide third parties claiming as purchaser in good faith for valuable consideration in respect of the properties.

[24] The withdrawal of the charges by the PP against OC Phang shows that the PP is deemed to have admitted that there is no predicate offence that has been established to warrant an application to be made to the learned High Court judge for the forfeiture of the property.

THE RELEVANT STATUTORY PROVISIONS

[25] It would be convenient and necessary to reproduce the relevant provisions of AMLATFA which will be referred and discussed in this judgment.

[26] We begin with s 4 of the AMLATFA which is the basis of the forfeiture of the properties in this appeal. s 4 of the Act reads:

> (1) Any person who —
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> (a) engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence;
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> (b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or uses proceeds of an unlawful activity or instrumentalities of an offence;
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> (c) removes from or brings into Malaysia, proceeds of an unlawful activity or instrumentalities of an offence; or
>
> (d) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity or instrumentalities of an offence,
>
> commits a money laundering offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an

unlawful activity or instrumentalities of an offence at the time the offence was committed or five million ringgit, whichever is the higher. A

(2) For the purposes of sub-s (1), it may be inferred from any objective factual circumstances that —

(a) the person knows, has reason to believe or has reasonable suspicion that the property is the proceeds of an unlawful activity or instrumentalities of an offence; or B

(b) the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is the proceeds of an unlawful activity or instrumentalities of an offence. C

(3) For the purposes of any proceedings under this Act, where the proceeds of an unlawful activity are derived from one or more unlawful activities, such proceeds need not be proven to be from any specific unlawful activity.

(4) A person may be convicted of an offence under sub-s (1) irrespective of whether there is a conviction in respect of a serious offence or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence. D

[27] 'Unlawful activity' is defined under s 3 of the Act as: E

any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence

[28] Section 56 of the Act deals with forfeiture of property where there is no prosecution and reads: F

(1) Subject to s 61, where in respect of any property frozen or seized under this Act there is no prosecution or conviction for an offence under sub-s 4(1) , the Public Prosecutor may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under sub-s 4(1). G

(2) The judge to whom an application is made under sub-s (1) shall make an order for the forfeiture of the property if he is satisfied- H

(a) that the property is the subject-matter of or was used in the commission of an offence under sub-s 4(1) ; and

(b) that there is no purchaser in good faith for valuable consideration in respect of the property. I

(3) Any property that has been seized and in respect of which no application is made under sub-s (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.

A (4) In determining whether or not the property has been obtained as a result of or in connection with an offence under sub-s 4(1) , the court shall apply the standard of proof required in civil proceedings.

B **[29]** Section 56 of the Act is subject to the provision of s 61 of the same Act which provides the rights of bona fide third parties. It is a statutory requirement under the aforesaid section that a notice must be published in the *gazette* to notify any third party who may have any claim or interest in the property to attend the court on the date specified to show cause why the property seized should not be forfeited:

C (1) The provisions in this Part shall apply without prejudice to the rights of bona fide third parties.

(2) The court making the order of forfeiture under s 55 or the judge to whom an application is made under sub-s 56(1) shall cause to be published a notice in the Gazette calling upon any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited.

D

(3) A third party's lack of good faith may be inferred, by the court or an enforcement agency, from the objective circumstances of the case.

E

(4) The court or enforcement agency shall return the property to the claimant when it is satisfied that-

(a) the claimant has a legitimate legal interest in the property;

F

(b) no participation, collusion or involvement with respect to the offence under sub-s 4(1) which is the object of the proceedings can be imputed to the claimant;

(c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use;

G

(d) the claimant did not acquire any right in the property from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and

H

(e) the claimant did all that could reasonably be expected to prevent the illegal use of the property.

THIS APPEAL

I **[30]** Before us learned DPP argued that under s 4(2) of the AMLATFA the respondents need not be charged for the commission of a serious offence. Even if the respondents are charged for such an offence, it does not necessarily means that respondents must be convicted of the serious offence in order for the properties seized to be forfeited.

[31] It was further argued by learned DPP that the investigation and findings of the IO are based on information and belief, and the sources and grounds are as stated in the affidavits. The relevant supporting documents are annexed to the affidavits to prove the commission of the predicate offences. When the application was filed the trial for the predicate offences was still on-going at the sessions court therefore it was submitted that any witness statements produced in the on-going trial must be regarded as privileged documents, prejudicial and sub-judice to the on-going trial if appended to the affidavits in support for purpose of the forfeiture application.

[32] Leaned DPP argued in submission that Supt Wiley had explained in his affidavit that his findings was based on the documentary evidence detailing the money trail. Therefore, on the balance of probabilities the averments made together with the documentary evidence as appended were sufficient to prove that the properties seized were the subject matter or used in the commission of the offence under s 4(1) of the AMLATFA. DPP Saifuddin stated in his affidavit dated 22 November 2010 that he was satisfied that the properties seized are the subject matter of, or was used in the commission of an offence under s 4(1) of the AMLATFA.

[33] In response learned counsel for the first to eighth respondents argued that the properties sought to be forfeited were procured from the lawful proceeds based on the contracts entered between the parties. However, the prosecution failed to meet the threshold requirement under the provisions of AMLATFA, that is:

(a) failed to prove the predicate offence beyond reasonable doubt; and

(b) failed to identify the nature and extent of the participation of the various respondents with regards the offence of money laundering and with reference to s 3 of the AMLATFA.

[34] Learned counsel for the respondents submitted that the Court of Appeal had correctly concluded that the predicate offences have not been proven, and that the properties could not be possibly tainted and subsequently forfeited. None of the respondents were ever charged with any of the offence.

[35] The mechanism for the forfeiture of property seized when there is no prosecution is provided under s 56 of the AMLATFA. It must be emphasised that in an application made pursuant to s 56(1) of the Act the critical issue is not the guilt or otherwise of any person under s 4(1)(a) of the AMLATFA but the legal status of the property seized. The court when considering an application for a forfeiture order must be satisfied that the respondent acquired the seized property from the proceeds of an unlawful activity and/or illegal transaction. By the provision of the Act the prosecution submitted that the

properties sought to be forfeited are the subject matter or evidence relating to the commission of the offence under s 4(1) of the same Act.

[36] Learned DPP argued that the investigation and findings of the IO were based on information and belief, and the sources and grounds were as stated in the affidavits supported with the relevant documents annexed to the affidavits to prove the commission of the predicate offences. It was also argued that when the application was filed, the trial for the predicate offences were still on-going at the sessions court. Therefore, any witness statements must be regarded as privileged documents and would be prejudicial and sub-judice to the on-going trials if appended to the affidavits in support for purpose of the forfeiture application.

BALANCE OF PROBABILITIES

[37] In an application for an order of forfeiture of property under s 56(1) AMLATFA where there is no prosecution, the standard of proof applicable in order to determine whether the property has been obtained as a result of or in connection with an offence under s 4(1) of the same Act, is the standard of proof required in civil proceedings and any question of fact to be decided by the court in proceedings under the Act shall be decided on the balance of probabilities. Section 70(1) of the Act reads:

> 70(1) Any question of fact to be decided by a court in proceedings under this Act shall be decided on a balance of probabilities.

[38] The Court of Appeal in determining whether the conditions in s 56 of the AMLATFA has been established concluded:

> [69] It is trite law that an application made under s 56 of the AMLATFA requires proper proof of relevant facts which in turn must be supported by admissible evidence (refer *Public Prosecutor v Thong Kian Oon & Ors* [2012] 10 MLJ 140; [2012] 8 CLJ 119). This is to enable the court to arrive at a correct decision since the court is not merely exercising a ministerial or executive character when adjudicating an s. 56 application.
>
> [70] From our perusal, we find that the PP through the investigating officers merely produced via their affidavits allegations of facts and charges brought against third parties (Datin Paduka OC Phang, Law Jhen Dong, Bernard Tan and Stephen bin Abok) who have all been acquitted and discharged.
>
> [71] At the same time, the PP had failed to disclose and provide the names, identity and sources of information that they had received and relied upon and the reasons for their belief in such information and the involvement of each of the respondents to these charges. This is relevant since the PP had submitted that the four accused on a balance of probabilities had committed money laundering. If the four accused had committed money laundering, then in what manner has all the respondents abetted them.

[72] The investigating officers have also failed to disclose all of the documents relied upon by them in coming to their conclusions or as to their reasons for having relied on the documents as being a true reflection of the facts alleged.

[73] Accordingly, it is impossible for the PP to have 'been satisfied' that the bringing of the application was appropriate, under the circumstances. The PP should have set out in Saifuddin's first affidavit the evidence that he relied on to 'satisfy himself' that:

(i) there are predicate offences committed by the four accused; and

(ii) that the proceeds derived therefrom had been used in the commission of an offence of money laundering.

[74] Further, in the first affidavit of IO Supt Rajagopal, he merely relies on the allegations in the police report in exh RG-1 (pp 742 to 750 of record of appeal (ROA) vol 3(6)) lodged by Datuk Lee Hwa Beng to conclude that the predicate offences under s 409 of the Penal Code has been made out against Datin Paduka OC Phang, and the predicate offence under s 420 of the Penal Code has been made out against Law Jenn Dong, Bernard Tan Seng Swee and Stephen bin Abok.

[39] The provision of s 56 of the AMLATFA does not absolve the prosecution from proving on a balance of probabilities that the properties seized under the purview of the Act were procured as a result of or in connection with an illegal activity or transaction. The PP must be able to prove that the properties seized were procured in connection with the commission of the predicate offence.

[40] Lord Nicholls of Birkenhead in *Re H and others (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1 explained that the standard of proving on a balance of probabilities was a flexible test and that the court must be satisfied:

> ... on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.

[41] The difference between succeeding on the balance of probabilities and failing on the balance of probabilities was explained by Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372, where His Lordship in usual eloquent manner:

> If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.

[42] Even on the balance of probabilities it is nevertheless incumbent upon the prosecution in an application for forfeiture under s 56 of the AMLATFA to prove the following:

(a) the existence of a predicate offence, the evidence and basis upon which the commission of the offence has been established;

(b) identify the proceeds or 'the subject-matter of' the predicate offences; and

(c) the manner the respondents have abetted or participated in the commission of the predicate offence.

[43] In *Public Prosecutor v Billion Nova Sdn Bhd & Ors* [2016] MLJU 1823; [2016] 2 CLJ 763, the Court of Appeal through the judgment of Idrus Harun JCA (as he then was) elucidated what is required to be proven before a forfeiture order could be granted:

> We would say in conclusion that it should be assumed that the court hearing an application had no knowledge about the facts surrounding the case. It was for each party to present the evidence. At the end of the proceedings, applying the civil burden of proof which is on the balance of probabilities, the winner would be the party that has successfully tipped the scale in its favour. It is incumbent on the appellant to show on preponderance of evidence that all facts necessary to prove their case are presented and are probably true. The appellant needs only to prove their case which is more probable than the respondent. The evidence to which we have alluded to, standing on its own, is insufficient to support a conclusion that the monies in question are the proceeds of an unlawful activity which constitutes a money laundering offence under s 4(1) of the AMLATFA. The appellant, we find has failed to prove the case on the balance of probabilities to the level that we can safely say that we are satisfied that all the essential requirements in s 56(1) of the AMLATFA have been established.

[44] In this appeal before us the notice of motion to forfeit the properties was supported by the affidavits of DPP Muhammad Saifuddin bin Hashim Musaimi and the police IOs, Superintendents Willey and Rajagopal Ramadhass. The IOs had affirmatively deposed that through the investigation conducted it was found that the seized properties had been procured by the respondents as a result of or in connection with the commission of the predicate offences by the accused OC Phang, Law Jen Dong, Bernard Tan Heng Swee and Stephen Abok. Supt Wiley had stated in his affidavit that the properties were tainted and were used in the commission of the offence under s 4(1) of the AMLATFA. DPP Saifuddin stated in his affidavit dated 22 November 2010 that he was satisfied that the properties seized are the subject matter of, or was used in the commission of an offence under s 4(1) of the AMLATFA.

[45] Supt Rajagopal averred in his affidavit that OC Phang did not have the power to issue the variation order as she had no authority to do so unless she obtained the prior approval of PKA Board, which the IO alleged this was not done therefore, OC Phang had acted beyond her authority (Re: para 14, of the IO Supt Rajagopal's affidavit). By failing to obtain the prerequisite approval OC Phang had committed a criminal breach of trust. It is pertinent to note that the parties to the agreement at all times were acting under the advice of solicitors. However, there were no documentary evidence to support the allegation that OC Phang acted beyond her authority. Even if she did, this act actually involved PKA's internal company affairs of which those outside that is, Kuala Dimensi cannot interfere and will not have any knowledge of. Parties to the agreements had at all times acted under advice of solicitors and all the NOPS issued were in fact duly paid.

[46] We have examined the affidavits in its entirety and we are of the view that the IOs failed to describe whose statements were taken as part of the investigation neither was there any explanation as to the effect and purport of the said statements. The prosecution failed to provide the names, identity and sources of information that they had relied upon and the reasons for their belief in such information and the involvement of each of the respondents to these charges. If the four accused had committed money laundering, then the prosecution must explicitly state the manner the respondents abetted them or participated in the illegal activity. The prosecution failed to tender or describe the nature and contents of any of the statements that was recorded under the AMLATFA.

[47] IO Supt Rajagopal averred that the works under the agreement were never carried out yet there was no other evidentiary proof except that TNB did not approve the works. Merely stating the facts without sufficient documentary evidence does not necessarily mean that the prosecution satisfied the burden on a balance of probabilities that the properties were indeed acquired using fund from an illegal transaction. On the factual matrix of the case, it is patently clear that the prosecution failed to link the properties to the purported illegal transaction and/or illegal activity that the proceeds are as a result of the predicate offence. The evidence that was adduced through the affidavits had merely contained hearsay evidence and material errors of fact. There were no documentary evidence that linked the properties were acquired for that illegal transaction or procured through an illegal activity.

[48] As we have alluded the affidavits merely described the money trail, in particular the movement of money from Kuala Dimensi's to various other account/s but did not offer any evidentiary proof that the properties sought to be forfeited were from the subject-matter of or was used in the commission of the offence of money laundering or that they are connected to the two

predicate offences. The affidavits of the appellant lack substantial evidence to support the allegation of the commission of the predicate offences neither were there any evidence that the respondents had abetted the accused or had participated in the commission of the offence. The affidavits lack explanations, explaining explicitly how the properties were funded and the linkage to the illegal transaction.

[49] When applying the civil standard of proof on a balance of probabilities merely stating facts with scanty documentary evidence is insufficient. There must be more cogent documentary evidence to support the averments made and that all facts necessary to prove their case must be presented and are probably true. The affidavits in support left much to be desired as there are serious gaps and are devoid of any linkages to the commission of the offence when considered in light of the mandatory requirements as provided under s 56(1) AMLATFA. On the contrary, the respondents through their affidavits in reply explained in detail and adduced sufficient documents to justify the manner the properties were procured.

[50] In the instant appeal the prosecution failed to prove the case on the balance of probabilities and to satisfy that all the essential requirements as provided in s 56(1) of the AMLATFA have been established.

CONCLUSION

[51] We have read the affidavits in its entirety and we agree with the Court of Appeal that the prosecution failed to identify the nature and extent of the participation of the respondents with the offence of money laundering or linking the procurement of the properties to the predicate offence. Consequently, we agree with the view that the prosecution failed to establish, on a balance of probabilities, that the properties seized had been obtained as a result of or in connection with an offence under s 4(1) AMLATFA.

[52] We are satisfied that the appeal has no merits. We dismiss the appeal and affirm the decision of the Court of Appeal.

Appeal dismissed; COA's decision affirmed.

Reported by Ashok Kumar